No. ____

991177 JAN 14 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

DENNIS D. CHRISTENSEN, M.D.; and BERNARD SMITH, M.D., on behalf of themselves and their patients seeking abortions,

Petitioners,

—v.—

JAMES E. DOYLE, in his official capacity as the Attorney General of the State of Wisconsin; and DIANE M. NICKS, in her official capacity as District Attorney for Dane County and as representative of a class of all District Attorneys in Wisconsin,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SIMON HELLER
(Counsel of Record)
BONNIE SCOTT JONES
JANET BENSHOOF
The Center for Reproductive Law & Policy
120 Wall Street
New York, New York 10005
(212) 514-5534

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether Wisconsin's ban on "partial-birth abortions" violates the right to privacy because, under any reasonable construction, it prohibits most pre-viability abortions?

2. Whether Wisconsin's ban on "partial-birth abortions," even if it could be construed to prohibit only certain less commonly used abortion methods, violates the right to privacy because it: (a) has the purpose and effect of imposing a substantial obstacle in the path of women seeking those abortions prior to viability; (b) prohibits women from determining, in consultation with their physicians, the nature of the abortion procedure they will undergo; (c) does not serve a legitimate state interest; and (d) lacks any exception for protecting the woman's health, lacks any medical emergency exception, and contains only an inadequate exception to protect the woman's life?

3. Whether the "precautionary injunction" concocted by the court below constitutes an unauthorized *de facto* rewriting of a state statute?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were appellants in the court of appeals: Planned Parenthood of Wisconsin; Gary T. Prohaska, M.D.; Frederik F. Broekhuizen, M.D.; Gavin Jacobson, M.D.; and Neville Sender, M.D.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

I. The Act 3

II. Facts 4

III. History of the Litigation 9

IV. Decision Below 10

REASONS FOR GRANTING THE WRIT 13

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE ABORTION JURISPRUDENCE OF THIS COURT 14

A. The Decision Below Conflicts With the Principle That a Ban on Most Abortions is Unconstitutional. 14

B. The Act as Rewritten by the Court Below Conflicts with Several Strands of this Court's Abortion Cases. 19

1. The Decision Below Violates the Principle that an Abortion Statute is Unconstitutional if it Has the Purpose or Effect of Imposing an Undue Burden..... 20

2. The Decision Below Violates the Principle That a Woman Has the Right to Choose, In Consultation with Her Physician, from among Safe Abortion Methods. 22

3. The Decision Below Violates the Principle That Any Abortion Regulation Must Serve Either the State Interest in Maternal Health or Potential Life by Permissible Means... 23

4. The Decision Below Violates the Principle That Any Abortion Regulation Must Contain Exceptions to Protect the Woman's Life and Health. 24

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH DECISIONS OF THE SIXTH, EIGHTH AND TENTH CIRCUITS. 26

III. THE DECISION OF THE COURT CONFLICTS WITH THE DECISIONS OF THIS COURT AND MANY COURTS OF APPEALS PROHIBITING FEDERAL COURTS FROM REWRITING STATE STATUTES..... 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page**

Benten v. Kessler, 505 U.S. 1084 (1992) 22

Carhart v. Stenberg, 192 F.3d 1142 (8th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3338 (U.S. Nov. 15, 1999) (No. 99-830) ..... *passim*

Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 614 (E.D. La. 1999), *appeal docketed*, No. 99-30324 (5th Cir. Apr. 7, 1999) 15

Chicago v. Morales, 527 U.S. 41 (1999) 29

City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983) 23

Colautti v. Franklin, 439 U.S. 379 (1979) 25-26

County of Jefferson v. Renz, No. 97-3512, 1999 WL 124095 (Wis. Dec. 22, 1999) 16

Doe v. Bolton, 410 U.S. 179 (1973) 26, 30

Ex parte Young, 209 U.S. 123 (1908) 30

Hope Clinic v. Ryan, 995 F. Supp. 847 (N.D. Ill. 1998) 9, 11

Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996) 14, 24-25, 28

Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794 (8th Cir. 1999) 13, 15, 27

Mazurek v. Armstrong, 520 U.S. 968 (1997) 21-22

Planned Parenthood v. Casey, 505 U.S. 833 (1992) ..... *passim*

Planned Parenthood v. Danforth,
428 U.S. 52 (1976) ..... *passim*

Planned Parenthood v. Doyle, 195 F.3d 857
(7th Cir. 1999) 1

Planned Parenthood v. Doyle, 162 F.3d 463
(7th Cir. 1999) 1, 9

Planned Parenthood v. Doyle, 44 F. Supp. 2d 975
(W.D. Wis. 1999) 1

Planned Parenthood v. Doyle, 9 F. Supp. 2d 1033
(W.D. Wis. 1998) 9

Planned Parenthood v. Doyle, No. 98-C-305-S
(W.D. Wis. May 12, 1998) 9

Planned Parenthood v. Miller, 195 F.3d 386
(8th Cir. 1999), *petition for cert. filed*, 68
U.S.L.W. 3434 (U.S. Jan. 3, 2000)
(No. 99-1112) 13, 15, 27

Planned Parenthood v. Verniero,
41 F. Supp. 2d 478 (D.N.J. 1998),
appeal docketed, No. 99-5042
(3d Cir. argued Nov. 19, 1999) 15

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) 29

Rhode Island Med. Soc'y v. Whitehouse,
66 F. Supp. 2d 288 (D.R.I. 1999), *appeal*
stayed, No. 99-2095 (1st Cir. Nov. 22, 1999) 15

Richmond Med. Ctr. v. Gilmore,
55 F. Supp. 2d 441 (E.D. Va. 1999),
stayed pending appeal without opinion,
No. 99-2000 (4th Cir. Sept. 14, 1999) 15

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

State v. Arnold, 258 N.W. 843 (Wis. 1935) 17

State v. Bodoh, 595 N.W.2d 330 (Wis. 1999) 16, 17

Thornburgh v. ACOG, 476 U.S. 747 (1986) 22, 25

Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988) 29

Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998) 13-14, 27, 28

Constitution, Statutes and Rules

U.S. Const. amend. XIV, § 1 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 9

28 U.S.C. § 1331 9

Sup Ct. R. 10(a) 14

Wis. Stat. § 895.038 3

Wis. Stat. § 939.23 2

Wis. Stat. § 939.23(3) 4, 16

Wis. Stat. § 939.23(4) 16

Wis. Stat. § 939.50(3)(a) 4

Wis. Stat. § 940.15(6) 5

Wis. Stat. § 940.16(1)(a) 4

Wis. Stat. § 940.16(1)(b) 3

Wis. Stat. § 940.16(2) 4

Wis. Stat. § 940.16(3) 4

Dennis Christensen, M.D., and Bernard Smith, M.D., on behalf of themselves and their patients seeking abortions, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The court of appeals decision on the merits of this case (A-2-A-62) is reported at *Planned Parenthood v. Doyle*, 195 F.3d 857 (7th Cir. 1999) ["*Doyle III*"]. The opinion of the district court (A-63-A-84) is reported at *Planned Parenthood v. Doyle*, 44 F. Supp. 2d 975 (W.D. Wis. 1999) ["*Doyle II*"]. The court of appeals decision on Petitioners' appeal of the district court's denial of a preliminary injunction (A-85-A-120) is reported at *Planned Parenthood v. Doyle*, 162 F.3d 463 (7th Cir. 1999) ["*Doyle I*"].

JURISDICTIONAL STATEMENT

The court of appeals entered its final judgment on October 26, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1 (in relevant part):

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ..

Wis. Stat. § 940.16 (1999):

> Partial-birth abortion
>
> (1) In this section:

(a) "Child" means a human being from the time of fertilization until it is completely delivered from a pregnant woman.

(b) "Partial-birth abortion" means an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child.

(2) Except as provided in sub. (3), whoever intentionally performs a partial- birth abortion is guilty of a Class A felony.

(3) Subsection (2) does not apply if the partial-birth abortion is necessary to save the life of a woman whose life is endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical disorder, physical illness or physical injury caused by or arising from the pregnancy itself, and if no other medical procedure would suffice for that purpose.

Wis. Stat. § 939.23 (in relevant part):

Criminal intent

(3) "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally."

(4) "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.

(5) Criminal intent does not require proof of knowledge of the existence or constitutionality of the section under

which the actor is prosecuted or the scope or meaning of the terms used in that section.

STATEMENT OF THE CASE

More than twenty-five years after this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), the women of Wisconsin face a law that would again criminalize safe abortion procedures. Wisconsin has enacted an abortion ban that applies throughout pregnancy and subjects violators to mandatory life imprisonment. Wis. Stat. §§ 895.038, 940.16 ["the Act"]. The Act, which purports to regulate procedures it refers to as "partial-birth abortions," actually describes in lay terms the steps physicians take during abortions by all safe, common abortion methods. Yet despite the breadth of these prohibitions, the Act lacks any exception for abortions performed in medical emergencies or to preserve a woman's health, and it contains only an inadequate exception for abortions performed to save a woman's life. If the Act takes effect, the performance of virtually any abortion in Wisconsin will expose physicians to life imprisonment, even if the abortion is performed by a safe abortion method and even if that method is the most appropriate one for the woman's needs and circumstances. Even if the Act were rewritten to apply only to certain well-defined abortion methods, it would still compel women to undergo riskier abortions and chill the development of safer techniques.

I. The Act

The Act bans the intentional performance of "an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes delivery of the child." Wis. Stat. § 940.16(1)(b). Wisconsin law defines "intentionally" as either acting with the "purpose to do the thing or cause the result specified" or acting with the "aware[ness] that his or her conduct is practically certain to

cause that result." Wis. Stat. § 939.23(3). This element of intent "is satisfied by conduct carrying a high risk of the forbidden result even if that result is not desired." A-96.

A "child" is defined under the Act as a "human being from the time of fertilization until it is completely delivered from the pregnant woman," Wis. Stat. § 940.16(1)(a); thus, by its terms, the Act applies at every gestational age. The Act provides a narrow exception to its criminal sanctions only where a "partial-birth abortion" "is necessary to save the life of a woman whose life is endangered by a physical disorder, physical illness or physical injury" and only where "no other medical procedure would suffice for that purpose." Wis. Stat. § 940.16(3). Violation of the Act is a class A felony, punishable by life imprisonment. Wis. Stat. §§ 939.50(3)(a); 940.16(2).

II. Facts[1]

Petitioners are physicians who provide gynecological services, including abortions by suction curettage, D&E and D&X variants of D&E, at reproductive health care facilities in Wisconsin. Petitioners challenge the Act on behalf of themselves and their patients seeking abortions.

Abortions are performed by a number of techniques, each of which must be described to illustrate the scope of the Act. In any abortion, the physician aims to minimize risk to the woman. Thus, the physician attempts to complete the procedure as quickly as possible, minimize blood loss, and minimize the number and distance of instrumental insertions into the woman's uterus. Amended Stipulation of Facts ¶ 21 [hereinafter ASF]. Choice of pre-viability abortion method depends on a range of factors, including the gestational age

---

[1] To the extent that the factual assertions below conflict with the district court's findings of fact, Petitioners contend that the district court's findings were clearly erroneous in that they were unsupported by the record and at times in conflict with the parties' stipulations of fact.

of the fetus, the woman's health and medical conditions, the physician's skill, the woman's preferences, the woman's prior surgical history, the woman's concern about preserving her fertility, and the need to have an intact fetus for genetic testing. ASF ¶ 23.[2]The most common method of first trimester and early second trimester abortion is suction curettage. In a suction curettage procedure, the physician generally dilates the cervix, inserts a tube (cannula) through the vagina and into the uterus, and removes the embryo or fetus and other products of conception through the cannula using suction. ASF ¶ 27; A-66. The physician sometimes makes multiple passes into the uterus with the cannula before completely removing the fetus. ASF ¶ 30. The physician also sometimes removes part or all of the fetus with forceps rather than suction. ASF ¶ 31. After a portion of the fetus has been evacuated, other parts of the fetus remaining in the uterus will sometimes be alive. ASF ¶ 28; Tr. at 1-193:17-20, 1-228:14-20. In such a case, the physician has "partially vaginally deliver[ed] a living child" within the meaning of the Act. Physicians who perform suction curettage abortions know that the procedure will inevitably kill the fetus, and that suctioning a pre-viable fetus or embryo out of the uterus or removing it by forceps will cause the fetus or embryo to die within a few minutes. ASF ¶¶ 29, 34; Tr. at 1-193:17-20; 1-228:14-20.

The most common method of later second-trimester abortion is the dilation and evacuation procedure ["D&E"]. ASF ¶ 35. There is a continuum of D&E variations ranging from intact removal of the fetus to removing the fetus in many pieces. ASF ¶¶ 37, 42, 44. *See also* Tr. at 1-9:2-3, 1-85:14-22, 1-168:23 to 1-169:4; Trial Testimony of Stubblefield at 9:17-20 [hereinafter Stubblefield Tr.]. In a D&E, the physician generally dilates the cervix by inserting

---

[2] Wisconsin already restricts post-viability choice of abortion method in a manner that conforms to this Court's precedents. Wis. Stat. § 940.15(6).

laminaria (seaweed placed in the woman's cervix, which absorbs natural moisture and expands). When sufficient dilation has been achieved and the laminaria are removed, the physician ruptures the amniotic sac. ASF ¶ 36; A-66. Sometimes the physician uses suction to remove parts of the fetus and products of conception. The physician then inserts forceps into the woman's uterus to grasp and withdraw the remaining parts of the fetus through the cervix into the vagina and out of the woman's body. This process frequently involves dismemberment of the fetus and repeated insertions of the forceps into the woman's uterus to remove fetal parts. ASF ¶ 37; A-66. Dismemberment typically does not occur in utero; instead, the physician usually draws part of the intact fetus, such as a limb, into the vagina and then uses the traction of the fetal body against the cervix to disjoin the grasped part from the rest of the fetus, which remains in the uterus. Tr. at 1-25:14 to 1-26:2, 1-99:6-11, 1-127:18 to 1-128:3, 1-163:6-13, 1-221:7-18; 1-226:19-22; Stubblefield Tr. at 49:18 to 50:20. The fetus is often alive after a fetal part has been drawn into the vagina while the remainder of the fetus is in utero. ASF ¶ 38; A-66. In these cases, the physician has "partially vaginally deliver[ed] a living child" within the meaning of the Act. Physicians who perform abortions know that disjoining a fetal limb from a pre-viable fetus will cause the fetus to die within a few minutes. Tr. at 1-128:15-22, 1-163:14-18, 1-222:1-7.

During some D&Es, enough dilation occurs so that the physician can extract the fetus intact, with minimal insertion of forceps into the woman's uterus. ASF ¶ 42. During such procedures, the fetus is sometimes alive after part of it has been delivered into the vagina. ASF ¶ 43. When such an abortion is possible, the physician sometimes attempts to accomplish an intact removal, even if the physician had at the outset expected dismemberment to occur. ASF ¶ 44. During some D&Es, the physician extracts the fetus intact into the vagina, but the fetal skull lodges in the cervix. At this point,

the physician sometimes evacuates or crushes the skull to complete the extraction. ASF ¶¶ 45, 47; Tr. at 1-128:23 to 1-129:8, 1-164:16 to 1-165:3. Some members of the medical community refer to procedures involving the former method as intact dilation and extraction procedures ["D&X"]; other members of the medical community use the term "D&X" to refer to D&E procedures involving either the former or latter technique. ASF ¶¶ 47, 65; Tr. at 1-15:20 to 1-16:10, 1-77:22 to 1-78:8, 1-131:9-18, 1-168:14 to 1-169:4; A-67-A-68. During a D&X-type D&E under either definition, the fetus may be alive after it has been extracted intact up to the skull and before the skull is punctured or crushed. The fetus then dies immediately or within minutes as a result of the steps the physician takes to crush or evacuate the skull. ASF ¶¶ 46, 66-67. Physicians who perform D&X-type D&Es understand that the procedure will cause the death of the fetus. ASF ¶ 68.

D&X-type D&Es have certain medical advantages over other D&Es after approximately eighteen weeks from the first day of the woman's last menstrual period because they are, *inter alia*, quicker, easier, and involve fewer insertions of the forceps into the uterus. Tr. at 1-10:10 to 1-11:14, 1-14:7-16, 1-17:13 to 1-18:7, 1-87:9 to 1-88:8, 1-90:18:-23, 1-91:11 to 1-92:6, 1-110:20 to 1-111:24, 1-165:6-13, 1-166:2-15, 1-173:7-24; Stubblefield Tr. at 15:18 to 16:16, 17:9-19, 19:3 to 20:16, 22:9-21, 33:9-18, 35:21 to 37:3, 64:18 to 65:3; A-70. D&X-type D&Es also offer significant reductions in the risk of the abortion procedure for patients with particular maternal health conditions or fetal anomalies. Tr. at 1-19:3 to 1-21:7, 1-46:22 to 1-47:4, 1-79:6 to 1-83:19; Stubblefield Tr. at 23:11 to 25:4, 28:9 to 30:15; *see also* ASF ¶¶ 80, 81; Pl. Exh. 16 (ACOG Statement of Policy).

After the first trimester, the main alternative to D&E is induction. ASF ¶ 71. Inductions are always performed in hospitals, ASF ¶ 72. In an induction, the physician uses laminaria to dilate the cervix and introduces medications into

the patient that will both continue the dilation and induce labor. As a result of labor, the fetus is expelled from the woman's uterus. ASF ¶ 72; A-66. During some inductions the physician must collapse or compress the skull or the fetal abdomen or dismember the fetus to allow it to pass through the cervix. ASF ¶ 73. Physicians who perform inductions know that collapsing or compressing the fetal skull or dismembering the fetus will cause the death of the fetus. ASF ¶¶ 41, 67-68; Tr. at 1-32:1-9, 1-128:15-22, 1-163:14-18, 1-221:19-23. During inductions, fetal demise can occur at different times and from different causes. Sometimes fetal death will not occur until after the fetus has come partially or completely through the cervix. ASF ¶ 74. In these cases, the physician has "partially vaginally deliver[ed] a living child" within the meaning of the Act.

In a pre-viability abortion by any of the abortion methods described, the fetus is living at the beginning of the procedure; is vaginally delivered; is, by design, not living at the end of the procedure; and may be partly within the uterus and partly in the vagina when a step is taken by the physician that the physician knows will cause the death of the fetus within a few minutes. Tr. at 1-25:14-23, 1-30:11-14, 1-32:1-9, 1-96:6-18, 1-98:2-14, 1-99:6-11, 1-126:4-10, 1-126:22 to 1-128:7, 1-128:15 to 1-129:8, 1-129:17-21, 1-130:4-18, 1-34:14 to 1-135:16, 1-161:4-6, 1-162:3-24, 1-163:6-18; Stubblefield Tr. at 52:1-11, 68:13-19.[3] Thus, if the Act goes into effect -- whether as written or as revised by the precautionary injunction directed by the court of appeals -- Wisconsin abortion providers will have to cease providing abortions or alter their procedures in ways that would pose

---

[3] The only other methods of abortion available after the first trimester are hysterotomy or hysterectomy. These procedures involve removal of the fetus through the abdomen, rather than through the vagina, and are major surgical operations that require hospitalization and are rarely performed because of the risks they pose. ASF ¶ 78. They clearly remain legal under the Act.

unnecessary risks to pregnant women's health. Tr. at 1-110:20 to 1-111:6, 1-135:17-23, 1-169:5-17, 1-170:3-13, 1-171:6-17; Stubblefield Tr. at 52:1-17, 53:5 to 54:19, 109:5 to 110:1.

III. History of the Litigation

The district court had jurisdiction over this matter under 28 U.S.C. § 1331, because this is a case arising under the Fourteenth Amendment. Petitioners unsuccessfully sought a temporary restraining order and preliminary injunction from the district court. *Planned Parenthood v. Doyle*, No. 98-C-305-S (W.D. Wis. May 12, 1998); *Planned Parenthood v. Doyle*, 9 F. Supp. 2d 1033 (W.D. Wis. 1998). The Seventh Circuit reversed the district court's denial of a preliminary injunction in *Doyle I* and directed that the injunction be entered. On remand, the district court upheld the Act after a two-day trial. A-63-A-84. The district court stayed its ruling pending appeal, thus leaving the preliminary injunction in place.

Petitioners timely appealed to the court below, which had jurisdiction over the matter under 28 U.S.C. § 1291. The court of appeals consolidated Petitioners' appeal with the separate appeal of five other plaintiffs in this case before the district court. On August 13, 1999, the court of appeals *sua sponte* ordered that the two consolidated appeals from Wisconsin be argued *en banc* in conjunction with an appeal from a decision striking down Illinois's partial-birth abortion ban statute, *Hope Clinic v. Ryan*, 995 F. Supp. 847 (N.D. Ill. 1998), which had previously been argued before a panel of the court, but had not yet been decided.

On October 26, 1999, the court of appeals issued a five to four decision upholding both the Wisconsin and Illinois laws. Petitioners timely moved the court of appeals to stay the mandate, but the court denied that motion on November 17, 1999, also by a five to four vote. On November 18, 1999, the

court of appeals ordered immediate issuance of its mandate, but the next day *sua sponte* recalled the mandate. The court of appeals subsequently reconsidered Petitioners' stay motion *sua sponte*, but again denied the stay on November 30, 1999, this time by a five to five vote.[4] Petitioners filed a motion with Justice Stevens for a stay of the mandate pending the filing and disposition of a petition for certiorari, which was granted on November 30, 1999.

IV. Decision Below

The court of appeals conceded that the Act could encompass abortions by common methods, and that banning such abortions is unconstitutional. A-4, A-9-A-10. Nonetheless, the court of appeals abjured its duty to strike down the Act. Instead, it hypothesized about ways Wisconsin courts or agencies might construe the Act to apply only to D&X procedures; it ordered temporary injunctions against application of the Act to "normal" D&Es and inductions, without defining "normal;" and it left the ultimate construction of the Act to a process of case-by-case prosecutions and civil suits.

The court of appeals delineated three possible "saving" constructions of the Act. First, the court presumed that Wisconsin courts could rewrite the Act by adopting a construction based on a medical definition of D&X, such as that propounded by the American College of Obstetricians & Gynecologists ("ACOG"). A-12. Second, the court of appeals conjectured that Wisconsin courts could read the Act to require proof of intent not only to commit the enumerated elements of a "partial-birth abortion," but also intent that those steps amount to an illegal partial-birth abortion. A-16 to -17. Third, the court of appeals hypothesized that Wisconsin could prosecute D&X abortions under the Act while working out the Act's parameters through

---

[4] Circuit Judge Williams participated only in the second vote.

prosecutions. A-17. The court attempted to discount the chilling effect of such prosecutions by claiming that a prosecution under the Act would violate due process if applied to a "normal" induction or D&E. A-19-A-20. In addition, the court directed entry of "precautionary injunctions" by the district courts in Illinois and Wisconsin against such prosecutions. These injunctions would remain in place until the states clarified their laws through regulations, amendment or judicial constructions. A-20. The court of appeals did not explain how a physician will know if an induction or D&E procedure is "normal," and therefore safe to perform, or not "normal," and therefore a crime punishable by life imprisonment.[5]

The court of appeals also upheld the Act despite its lack of any exception for abortions performed to preserve a woman's health. The court concluded that an abortion restriction only needs a health exception if the restricted practice has demonstrable health benefits over other available practices in an "articulable category of situations." A-27. Because the court of appeals found that the medical

---

[5] To counter Petitioners' contention that the Act would chill a range of abortion procedures in Wisconsin, the court of appeals looked selectively outside the record to Indiana abortion statistics. The court found these figures to provide proof that "partial-birth abortion" bans do not cause physicians to forgo the D&E procedure or to substitute inferior procedures for the ones they would ordinarily use. A-23 to -24. The court reached this conclusion even though the statistics do not indicate whether the physicians altered the steps of their procedures in sub-optimal ways in order to avoid violating the law, and even though it had before it no evidence that the Indiana law -- virtually identical to the Illinois law held unconstitutional by the federal district court in *Hope Clinic* -- was actually viewed as enforceable by Indiana law enforcement authorities. Moreover, the court failed to consider other chilling effects of the Indiana law, for example: its impact on physicians' decision whether to begin providing abortions; its impact on development of new abortion methods in Indiana; and its impact on teaching of abortion surgery in Indiana.

community has conflicting views over the safety of D&X-type D&Es in "articulable categories of situations," it held that the legislature was entitled to exclude a health exception. A-26-A-28. Further, the court held that as construed to ban only D&X-type D&E procedures, the Act does not amount to an undue burden because, even if it imposes a substantial obstacle for the women affected by the ban, that obstacle is not undue in relation to the woman's privacy interest. A-31.

Finally, the court of appeals held that the Act does not impose an undue burden despite its lack of a relationship to the state's legitimate interests in maternal health and potential life. The court concluded that as long as an abortion restriction does not impose a substantial obstacle, it can be justified by morality or any other interest at all. A-31. Thus, once the court determined that the burden imposed by the Act was not substantial, it analyzed the law under a test even less stringent than rational basis review.

Chief Judge Posner wrote a dissenting opinion, in which three other circuit judges joined, concluding that the Act is "either absurdly (and unlawfully) overbroad or remarkably vague." A-55. The dissent argued that if the Act fails to distinguish between constitutionally protected abortion methods and banned methods, as the majority concedes it does, then it is unconstitutionally vague and should be enjoined. A-53-A-55. The dissent criticized the majority's remedy of "precautionary injunctions," stating that such unprecedented relief is beyond the federal court's authority and "a tacit acknowledgment of [the court's] inability to give the statutes a plausible narrowing interpretation." A-35-A-38, A-55. Further, the dissent determined that even if the Act is construed as only a ban on D&X, it would impose an undue burden for at least three reasons: (1) it cannot be justified as a health regulation or a legitimate attempt to inform women's decisions, and its distinction between protected and prohibited procedures is irrational, A-38-A-42; (2) it fails to include exceptions to protect women's health

when a prohibited procedure is the safest one for a particular woman, A-42-A-43; and (3) its purpose is to promote the view that potential life is more valuable than women's health, and to discourage women from seeking abortions, A-43-A-46.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with virtually every principle established by this Court's abortion decisions, from *Roe v. Wade*, 410 U.S. 113 (1973), to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). These conflicts, detailed below, warrant not only granting the petition, but also summary reversal. Simply put, the court below eviscerates a woman's right to obtain an abortion before viability both by eliminating the carefully crafted protections for that right developed by this Court over the past quarter century, and by devising a new state interest justifying abortion regulation that would also justify absolutely any infringement on the right.

Because the decision below so blatantly circumvents this Court's precedents, it unsurprisingly stands in direct conflict with three recent decisions of the United States Court of Appeals for the Eighth Circuit that also addressed efforts to ban or chill the performance of pre-viability abortions through broadly-worded "partial-birth abortion" statutes. *Planned Parenthood v. Miller*, 195 F.3d 386 (8th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3434 (U.S. Jan. 3, 2000) (No. 99-1112); *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3338 (U.S. Nov. 15, 1999) (No. 99-830); *Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794 (8th Cir. 1999). It also conflicts with a recent decision of the United States Court of Appeals for the Sixth Circuit holding that an Ohio statute banning certain abortion methods was invalid because its language encompassed the most common method of later second-trimester abortion. *Women's Med. Prof'l Corp. v. Voinovich*,

130 F.3d 187, 198-201 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). Finally, it conflicts with a recent decision of the United States Court of Appeals for the Tenth Circuit holding that, even after viability, a State may not interfere with a woman's access to the safest method of abortion. *Jane L. v. Bangerter*, 61 F.3d 1493, 1502-05 (10th Cir. 1995), *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996). The petition should also be granted to resolve these conflicts. *See* Sup Ct. R. 10(a).

In addition, the court of appeals directed the district court to enter an interim remedy, denominated a "precautionary injunction," to last until Wisconsin state courts or agencies clarify the scope of the Act. Though the court of appeals claimed to resort to this device to protect the constitutional rights of women seeking abortions, the precautionary injunction itself violates an important constitutional principle established by the decisions of this Court: it effectively rewrites a state statute in order to preserve it, thereby usurping the role of the Wisconsin state legislature.

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE ABORTION JURISPRUDENCE OF THIS COURT.

The decision below is a direct attack on virtually every holding of this Court regarding regulation of abortion since *Roe v. Wade*. Indeed, it treats this Court's precedents as irrelevancies rather than as the law of the land. The appropriate remedy is summary reversal.

A. The Decision Below Conflicts With the Principle That a Ban on Most Abortions is Unconstitutional.

As the factual record in this case demonstrates -- consistent with the findings of the Eighth Circuit -- abortions by all commonly-used abortion methods -- i.e., suction curettage, D&E, and induction -- sometimes can fall within

the proscriptions of the Act. *See generally supra* at 4-8. Each of those methods involves vaginal removal of a fetus that is living at the beginning of the procedure, no longer living at the end, and that dies somewhere in between, often when part of the fetus is in the vagina and the rest of the fetus is in the uterus. The purpose of any abortion procedure is to terminate a pregnancy by completely evacuating the woman's uterus. Terminating a pre-viable pregnancy will, by design, kill the fetus, and physicians who perform abortions know that the overall procedure, as well as certain particular steps within the procedure, will kill the fetus. Thus, in an abortion by any common method, the physician will sometimes partially vaginally deliver a living fetus, perform a step that will cause the death of the fetus, and then complete the delivery of the fetus.[6]

---

[6] Similar factual records in other cases have led numerous federal courts to conclude that the broad language of "partial-birth abortion" bans encompasses some or all of the commonly used pre-viability abortion methods. *See, e.g., Miller*, 195 F.3d at 388-89 (ban on "partial-birth abortion" that would prohibit D&E procedures, as well as some suction curettage procedures, was unconstitutional); *Carhart*, 192 F.3d at 1149-51 (striking ban on "partial-birth abortion" that would prohibit D&E procedures); *Jegley*, 192 F3d at 797-98 (ban on "partial-birth abortion" that would prohibit D&E procedures, as well as some suction curettage procedures, was unconstitutional); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 614 (E.D. La. 1999) (ban on "partial birth abortion" "*per se* unconstitutional" because it bans almost all pre-viability abortions), *appeal docketed*, No. 99-30324 (5th Cir. Apr. 7, 1999); *Planned Parenthood v. Verniero*, 41 F. Supp. 2d 478, 503-04 (D.N.J. 1998) ("partial birth abortion" ban imposed an undue burden "because its language potentially bans the most conventional and safest abortion procedures, without regard to the viability of the fetus"), *appeal docketed*, No. 99-5042 (3d Cir. argued Nov. 19, 1999); *Rhode Island Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288 (D.R.I. 1999), *appeal stayed*, No. 99-2095 (1st Cir. Nov. 22, 1999); *Richmond Med. Ctr. v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999), *stayed pending appeal without opinion*, No. 99-2000 (4th Cir. Sept. 14, 1999).

Contrary to the court of appeals' suggestions, the Act's broad proscriptions cannot reasonably be construed to reach only a defined subset of abortions, such as those D&X abortions falling under a medical definition. The Wisconsin legislature specifically rejected amendments that would have used a definition of "partial-birth abortion" similar to that of ACOG, instead adopting broad language that bears no similarity to any medical definition. *See* Pls.' Exhs. 5 (Senate Amendment 5), 11 (Assembly Amendment 4), 16 (ACOG Statement of Policy). These facts prevent the Wisconsin courts from adopting the construction suggested by the court below, for the goal of Wisconsin courts in interpreting a statute is to discern the intent of the legislature. *State v. Bodoh*, 595 N.W.2d 330, 333 (Wis. 1999). Consequently, Wisconsin courts will not adopt a construction of a statute that the legislature rejected in passing the law. *See County of Jefferson v. Renz*, No. 97-3512, 1999 WL 124095 at *10 (Wis. Dec. 22, 1999) (because legislature rejected proposed "reason to believe" and "reasonably suspects" standards in favor of "probable cause to believe" standard it must have intended a more stringent standard than "reasonable suspicion.").

Further, Wisconsin cannot follow the court of appeals' suggestion that it read the ban to require proof of intent not only to commit the enumerated elements of a "partial-birth abortion," but also to have those steps amount to an illegal partial birth abortion. The Act already contains a scienter requirement different than that suggested, and Wisconsin criminal law explicitly states that the element of criminal intent set forth in the Act focuses on the actor's expectation as to the outcome of his actions, not on his actual knowledge of the law or how the law's requirement apply to his conduct. Wis. Stat. § 939.23(3), (4). A Wisconsin court would certainly not find that the legislature intended to include an intent requirement that is different from that which it explicitly adopted and that conflicts with general principles

of Wisconsin criminal law. *State v. Arnold*, 258 N.W. 843, 845 (Wis. 1935); *Bodoh*, 595 N.W.2d at 333.

While the decision below states that Wisconsin set out to ban only D&X abortions, it also recognizes that the Wisconsin legislature also wished to ban abortions involving "small" or "immaterial" variations on the D&X technique. A-9, A-12. What the Wisconsin legislature and the court of appeals both failed to recognize -- or purposely ignored -- is that all abortion methods involving vaginal delivery are essentially variations on the same technique -- dilation of the cervix, removal of the products of conception with a combination of suction and instrumentation, and completion of the procedure by checking that all uterine contents have been evacuated. Thus, when the Wisconsin legislature promulgated the Act in order to ban what were seen as the "material" elements of a D&X, the result was a ban on the "material" elements of virtually all pre-viability abortion methods. Because the Act is not reasonably susceptible to a construction that would limit its application, its constitutionality must be assessed on the basis of what its language plainly bans.

In *Roe*, this Court held that a "criminal abortion statute . . . , that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without regard of other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." 410 U.S. at 164. Like the Texas statute struck in *Roe*, the Act, by its sweeping language, excepts from criminality only life-saving abortions (and, indeed, only some of them);[7] applies without regard to pregnancy stage; and applies "without regard of other interests involved," such as the woman's right to determine, in consultation with her physician, the "effectuation," *see id.*,

---

[7] In this respect, the Act conflicts even with the dissenting view of Justice Rehnquist in *Roe*. *See* 410 U.S. at 173 (Rehnquist, J., dissenting).

of the abortion decision. The decision below upholding the Act therefore conflicts squarely with *Roe*.

The decision likewise conflicts directly with this Court's re-affirmance of *Roe* in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). While *Casey* rejected *Roe*'s "rigid trimester framework," *id.* at 878, it also reaffirmed *Roe*'s "central holding" that "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 879. Under *Casey*, then, the Act is invalid because it prohibits all safe, commonly-used abortion methods and thereby prohibits most abortions, it prohibits many women from obtaining pre-viability abortions. The decision below thus conflicts with *Casey*'s re-affirmation of *Roe*'s "central holding." 505 U.S. at 879.

Even if the Act is viewed as prohibiting most, but not all, pre-viability abortions, the decision below is in direct conflict with this Court's decision in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). *Danforth* examined four factors in determining that Missouri's prohibition on certain abortion methods was invalid. The Act fails under each of these factors. First, *Danforth* observed that the Missouri statute banned an abortion method recognized as "an accepted medical procedure in this country." *Id.* at 77. There is no question that methods of abortion involving the steps proscribed by the Wisconsin statute -- suction curettage, D&E including D&X variations, and induction -- are all accepted medical procedures in this country, and are the current "prevalent" abortion methods in the United States. A-4. Second, *Danforth* noted that no alternatives safer than the prohibited methods that existed at that time were readily available in Missouri. 428 U.S. at 77. Likewise, because the Act bans the *safest* methods of abortion, perforce no safer methods are available; instead, the Act compels women to undergo abortions by less safe methods. *See supra* at 8-9. Third, *Danforth* found that the

language of the Missouri statute, like that of the Act at issue here, was broad enough to encompass several abortion methods, including the chief alternative and "other methods that may be developed in the future and that may prove highly effective and completely safe." 428 U.S. at 78. Finally, *Danforth* chides the lower court for failing to consider that the Missouri statute -- again like the Act -- suffers from the "anomaly" that it "does not prohibit techniques that are many times more likely to result in maternal death" than the prohibited methods. *Id.*

Based on these four factors, the court below should have followed *Danforth* and held that the Act "as a practical matter . . . forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method[s] outlawed," and that the Act therefore "fails as a reasonable regulation for the protection of maternal health . . . [but] comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions . . .." 428 U.S. at 79. The decision below therefore also conflicts squarely with *Danforth*.

B. The Act as Rewritten by the Court Below Conflicts with Several Strands of this Court's Abortion Cases.

The court below used the novel device of a "precautionary injunction" to promulgate a new Wisconsin law that would prohibit only certain -- as yet undefined -- abortions.[8] *See supra* at 11. However narrow the scope of the Seventh Circuit's prohibition, it still runs afoul of this Court's abortion jurisprudence.

---

[8] Petitioners do not raise a vagueness claim against the "precautionary injunction" at this time because the court of appeals left the scope of the injunction for the district court to determine. Nevertheless, the problems with such an injunction are readily apparent.

1. The Decision Below Violates the Principle that an Abortion Statute is Unconstitutional if it Has the Purpose or Effect of Imposing an Undue Burden.

The Act as rewritten by the Seventh Circuit to prohibit a subset of abortion procedures it calls "D&X" abortions, has no discernible purpose other than to make abortions more difficult to obtain, and, specifically, more dangerous for women. As the dissenters below found, the Wisconsin legislature's purpose was to set forth "in an ongoing war for public opinion" its position "that fetal life is more valuable than women's health." A-43. Such a purpose conflicts with *Casey*'s principle that pre-viability regulations of abortion must not have the purpose of imposing "substantial obstacles." 505 U.S. at 877. Surely an abortion regulation that makes abortions more dangerous and more difficult to obtain in order to convey hostility to women's right to abortion has the purpose of imposing a substantial obstacle on the women it affects. A-43 ("if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue"); s*ee also Danforth*, 428 U.S. at 79 (purpose of statute that forces women to undergo more dangerous abortions is to "inhibit" abortions); *cf. Casey*, 505 U.S. at 886 (upholding waiting period statute because it served state interest in persuading women to carry to term but did not impose "a real health risk").

Likewise, the effect of the Seventh Circuit's revision of the Act is to impose a "substantial obstacle" on the women it affects. The effect of an abortion regulation is measured by examining "the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894. Here, the group affected is all those women who, absent the Seventh Circuit's prohibition, would have obtained a pre-viability abortion by a "D&X" method, i.e., by

other than a "normal" suction curettage, D&E or induction. For these women, the effect is clear: they are deprived completely of choosing, in consultation with their physicians, the method of abortion most appropriate for them and are instead forced to undergo a less appropriate, and potentially riskier method. This must be a substantial obstacle for it fails to permit the physician to make the woman's health paramount. *Casey*, 505 U.S. at 880.

The court below dismissed the Act's burden on those affected women on the grounds that "there is always one or more other safe methods of abortion in addition to D&X." A-31. Thus, the court concluded that even for a woman who would choose a D&X abortion, and for whom that method would be safest and most appropriate, the ban does not impose an undue burden. The court did not explain this conclusion, and it conflicts with the principles that a woman has a right to choose amongst safe pre-viable abortion techniques, *infra* at 22-23 and that the state cannot force a woman to undergo a more dangerous abortion method. *Supra* at 20. The court apparently reached its holding by misconstruing the undue burden standard to permit substantial obstacles, so long as they are not "undue in relation to the woman's interests." A-31. This reading conflicts with *Casey*'s clear holding that "a provision of law is invalid if its . . . effect is to place a substantial obstacle in the path of a woman seeking an abortion." 505 U.S. at 878.[9]

---

[9] The court of appeals' undue burden analysis is also based on a misreading of *Mazurek v. Armstrong*, 520 U.S. 968 (1997). The court below interpreted that case as broadly holding that a physician-only law does not impose an undue burden. But that case dealt only with a physician-only law's *purpose*, not *effect*, of imposing an undue burden, and the *Mazurek* Court had no evidence before it as to the law's burden on the women affected. 520 U.S. at 972. Second, contrary to the Seventh Circuit's holding that a law's burden must be measured against the woman's privacy interest, rather than "society's interests," the *Mazurek*

2. The Decision Below Violates the Principle That a Woman Has the Right to Choose, In Consultation with Her Physician, from among Safe Abortion Methods.

This Court has consistently adhered to the principle that a State cannot interfere with a woman's selection, in consultation with her physician, of which abortion method to undergo pre-viability. Thus, already in *Roe*, this Court recognized that in the first trimester, "the abortion decision *and its effectuation*" must both be left to the medical judgment of the physician. *Roe*, 410 U.S. at 164 (emphasis added). Similarly, *Danforth* struck down a pre-viability method ban even though other, statistically safer methods, existed. *See* 428 U.S. at 77; *see also Benten v. Kessler*, 505 U.S. 1084, 1085 (1992) (Stevens, J., dissenting) (noting that liberty interest in abortion "has two components -- [the woman's] decision to terminate the pregnancy and her decision concerning the method of doing so"). Indeed, even after viability, the States must permit the physician to use the safest method of abortion in each case, even if that method does not favor fetal survival, *Thornburgh v. ACOG*, 476 U.S. 747, 768-69 (1986), and, indeed Wisconsin does so.

Although this Court in *Casey* abandoned the trimester framework of *Roe*, it did so only to expand the ability of the States to advance their interest in potential life by trying to persuade a woman to carry a pregnancy to term. A restriction on the abortion procedure before viability is obviously unrelated to potential life since the fetus has no chance of survival under any abortion method. Instead, such a restriction infringes upon the bodily integrity component of a woman's privacy right by prohibiting abortion methods that are medically the most appropriate for some women in the

---

Court relied on earlier cases upholding physician-only laws as means of ensuring abortion safety. *Id.* at 974-75.

judgment of physicians performing abortions in Wisconsin. The decision of the court below replaces the right established in *Roe* and *Casey* -- the right of the woman and her physician to choose the most appropriate pre-viability abortion procedure -- with a much narrower right to use abortion methods that are statistically safest for categories of women (rather than safest for the individual woman).[10]

Moreover, the decision below takes a temporal snapshot of abortion safety and holds that if an abortion method is not statistically safest for an "articulable category" of women *now*, a state may ban it *forever*. This approach ignores the evolving development of abortion care, in which abortions have become progressively safer since *Roe* due to innovations in abortion techniques. *Compare Danforth*, 428 U.S. at 77 (prostaglandin abortion was safest method of second-trimester abortion), *with City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 436-37 (1983) (development of D&E method rendered second-trimester abortions safe enough to be performed outside hospitals). It freezes abortion practice in a manner which undermines rather than promotes maternal health.

3. The Decision Below Violates the Principle That Any Abortion Regulation Must Serve Either the State Interest in Maternal Health or Potential Life by Permissible Means.

Roe left "State[s] free to place increasing restrictions on abortion as the period of pregnancy lengthens, *so long as those restrictions are tailored to the recognized state interests*." 410 U.S. at 165 (emphasis added). The only state interests recognized by this Court as justifying abortion

---

[10] In fact, the D&X-type D&E abortion techniques are safest for an "articulable category" of women, namely those in which sufficient dilation has occurred so that the intact D&X, with its decreased intra-uterine instrumentation, becomes feasible. *See supra* at 7.

regulation are "the State's profound interest in potential life," *Casey*, 505 U.S. at 878 and the state interest "[a]s with any [other] medical procedure" in "further[ing] the health or safety of a woman seeking an abortion." *Id.*

The Act does not further either state interest by permissible means. The only way in which it promotes the state interest in potential life is by prohibiting pre-viability abortions; but this is a substantial obstacle, and hence invalid. *See Casey*, 505 U.S. at 877. Nor does the Act serve the state interest in maternal health. As the record demonstrates, whether the Act (as written) prohibits suction curettage, D&E and induction abortions; or whether it (as rewritten by the court below) prohibits only certain types of D&E abortion, the Act deprives physicians of safe methods of abortion which are the most appropriate methods for certain women. This failure to serve either recognized state interest renders the Act invalid, just as in *Danforth* the failure of Missouri's method ban to further the state interest in maternal health did.

Because the Act serves no recognized state interest, and hence is both illegitimate and irrational under this Court's abortion jurisprudence, *see* A-97, the court below invented a new interest: "morality." Not only is this not a recognized state interest under any of this Court's decisions, but if it were, it could be used to justify *any* abortion restriction, no matter how unreasonable when viewed as a regulation designed to promote potential life or maternal health. The result is, in effect, to overturn the core holdings of both *Roe* and *Casey*. This result of the decision below warrants summary reversal.

4. The Decision Below Violates the Principle That Any Abortion Regulation Must Contain Exceptions to Protect the Woman's Life and Health.

It is a "consistent strain of abortion jurisprudence," *Jane L.*, 61 F.3d at 1504, that the health of a woman obtaining an

abortion "must be the physician's 'paramount consideration.'" *Id.* (quoting *Thornburgh*, 476 U.S. at 768-69). Indeed, *Casey* makes clear that even a regulation which does *not* impose an undue burden must contain an exception for medical emergencies, i.e., situations in which a woman's life or health would be endangered if the regulation were enforced. 505 U.S. at 880. The Act lacks any medical emergency exception whatsoever; and, what amounts to the same thing, it lacks any exception allowing the prohibited conduct where the conduct is necessary to protect a woman's health. It likewise lacks a full-fledged life exception. Despite these infirmities, the court below held that no health exception was required in its rewritten version of the Act, because plaintiffs had failed to establish that "the" D&X method was the safest abortion method in any particular case[11] and because no such exception is required unless the method is safest in an "articulable" category of cases.

The court of appeals' conclusion thus directly conflicts with *Casey*, which re-affirmed the basic holding of *Roe v. Wade*, 410 U.S. 113 (1973), that "forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." 505 U.S. at 880 (approving case-by-case medical emergency exception). Surely if a particular woman may not be delayed 24 hours in obtaining an abortion when doing so would threaten her health, even if the delay serves the legitimate state interest in dissuading the woman from obtaining an abortion, then a particular woman may not be forced to undergo a riskier method of abortion where forcing her to do so is completely unrelated to the state's interest in potential life.

The decision below also conflicts with this Court's decision in *Colautti v. Franklin*, 439 U.S. 379 (1979). First,

---

[11] The facts relied upon by the court of appeals in this regard are clearly erroneous and present a distorted view of the record.

Colautti specifically recognizes the "central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out." *Id.* at 387. Clearly, *Colautti* contemplates a case-by-case determination of the optimal manner in which to perform the abortion. Second, *Colautti* re-affirmed the holding of *Doe v. Bolton*, 410 U.S. 179 (1973), that the physician must retain discretion to exercise his medical judgment in light of the particular woman's circumstances. 439 U.S. at 387-88. The Pennsylvania statute in *Colautti* was struck down for its failure to make crystal clear that, on a case-by-case basis, the physician must be able to proceed in a manner that is safest for the patient. In sharp contrast to *Colautti*, the court of appeals upheld the Act even though it lacks any health exception whatsoever to a method ban that applies without regard to viability. This result simply cannot be squared with this Court's precedents.

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH DECISIONS OF THE SIXTH, EIGHTH AND TENTH CIRCUITS.

The court of appeals held that the Act is constitutional even though its plain language encompasses D&E abortions and even though it interferes with the woman's right to choose among safe pre-viability abortion methods. These holdings conflict with decisions of the United States Courts of Appeals for the Eighth, Sixth and Tenth Circuits. If states are free to enact sweeping language banning most abortions, only to have federal courts replace them with narrower, but nonetheless unconstitutional, regulations, then the basic tenets of *Roe* will be rendered meaningless. This Court should grant review to resolve these conflicts, each of which raises important constitutional questions.

In *Carhart*, the Eighth Circuit held that the partial-birth abortion ban statute enacted in Nebraska "encompasses more

than just D&X," and "prohibits . . . the D&E procedure as well." 192 F.3d at 1150. Because the Nebraska statute thus banned "the most common procedure for second-trimester abortions," *id.* at 1151, it imposed an undue burden and was unconstitutional. In *Jegley*, the same court held that the partial-birth abortion ban enacted in Arkansas could not be saved "by interpreting it to apply only to a D&X as defined by ACOG," concluding "that the statute actually enacted contains a much broader prohibition, and is therefore invalid." 192 F.3d at 795. Specifically, *Jegley* finds that the Arkansas statute prohibits steps that occur in "both the D&E procedure and the suction-curettage procedure used in second-trimester abortions," and thus "physicians performing those procedures will violate the Act." *Id.* at 798. In *Miller*, the Eighth Circuit likewise held that Iowa's partial-birth abortion ban "bars the D&E procedure, and, in some circumstances, the suction-curettage procedure as well." 195 F.3d at 389. Each of these three decisions is in conflict with the decision of the court below both because these decisions enjoin, rather than rewrite, the offending statutes, and because they each recognize that narrowing the statutes' sweeping abortion bans would require the court to "twist the words of the law and give them a meaning they cannot reasonably bear." *Carhart*, 192 F.3d at 1150.

The decision below also conflicts with the decision of the Sixth Circuit in *Voinovich*. There, the court of appeals held invalid an Ohio statute which purported to prohibit "the" D&X abortion procedure, but in fact used language far broader than, for example, the definitional language used by ACOG. Thus, that court concluded that the Ohio law's "definition of the prohibited abortion method includes both the D&E and D&X procedures." 130 F.3d at 200. The court held that "[a]s in *Danforth*, the Act bans the most commonly used second trimester procedure and therefore is an unconstitutional burden on a woman's right to choose to have an abortion." *Id.* at 201. Thus, the decision below conflicts

with *Voinovich* by upholding a statute that prohibits the most common second-trimester abortion method.

Finally, the decision below conflicts with the decision of the Tenth Circuit in *Jane L. v. Bangerter*. *Jane L.* holds that, even after viability, when the State's interest in potential life is at its apex, a State may not restrict a physician's choice of abortion method to serve that interest if the restriction would impose increased risk to a particular woman's health. 61 F.3d at 1504-05. The decision below holds instead that a new state interest in "morality" -- or indeed *any* state interest -- justifies banning a particular abortion method even if that method may be the safest for women in particular circumstances; under the reasoning of the court below, abortion methods remain immune to state prohibition only if they are *statistically safest* for some "*category*" of women. Under this reasoning, States could ban any variations in surgical technique in any pre-viability abortions, dictating the surgical instruments to be used, the manner in which the physician must apply the instruments, the medications the physician must or must not use, etc. All of these matters must be left, under *Jane L.*, to the physician's best judgment in the interest of maternal health. Under the conflicting decision below, they are subject to detailed and ongoing state regulation in the interest of morality.

Each of these conflicts merits resolution by this Court.

III. THE DECISION OF THE COURT CONFLICTS WITH THE DECISIONS OF THIS COURT AND MANY COURTS OF APPEALS PROHIBITING FEDERAL COURTS FROM REWRITING STATE STATUTES.

The court below, via the precautionary injunction it directed the district court to enter, has, in effect, written its own statute for the State of Wisconsin. This conflicts directly with the Eighth Circuit's appropriate refusal in

Carhart to "twist the words of the law." 192 F.3d at 1150. It then relegates the plaintiffs to state administrative and judicial proceedings for guidance about whether the Act -- the one drafted and enacted by Wisconsin itself -- in fact prohibits even more of their conduct than the interim statute enacted by the Seventh Circuit. Each of these two actions by the court below contravenes venerable principles of federal judicial restraint.

A federal court has no authority to rewrite a state statute, even "temporarily," to cure its constitutional flaws. If the Act will chill physicians from performing constitutionally protected abortions, then a federal court can give it a narrowing saving construction only if it is reasonably susceptible to such a construction. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). If such a construction is not possible, the court must strike down the law as unconstitutionally vague. *See Reno*, 521 U.S. at 884; *American Booksellers*, 484 U.S. at 397. The court below undertook the very action prohibited by these precedents. It rewrote a state statute that so that the risk it poses to constitutionally protected abortions will be "reduced to a constitutionally acceptable level," A-21, by an interpretation to which the law is not reasonably susceptible. This is beyond the authority of a federal court.

In defense of its novel expansion of federal judicial power over state laws, the court below relied on inapposite cases in which state laws had *already* been construed by state courts. In particular, the court of appeals unjustifiably extended *Chicago v. Morales*, 527 U.S. 41 (1999), which indicates that federal courts should evaluate state laws as they have been construed by state courts. Going far beyond this suggestion by this Court, this opinion below evaluates the Act on the basis of how a state court might construe it in the future. But no case supports this extension of *Morales*. Indeed, under the analytic framework of the court below, the

federal courts would never review state laws before they were construed. This would render federal constitutional rights largely unenforceable in federal court, an approach squarely in conflict with every abortion case decided by the Supreme Court since *Roe*, and with every facial challenge to the constitutionality of a state statute seeking prospective relief since *Ex parte Young*, 209 U.S. 123 (1908). At the same time, it would compel the Petitioners to face the vicissitudes of state court prosecutions as the forum in which to assert their patients' right to privacy, a result directly at odds with *Bolton*, 410 U.S. at 179.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted and the decision below should be summarily reversed.

Respectfully submitted,

SIMON HELLER
Counsel of Record
BONNIE SCOTT JONES
JANET BENSHOOF
The Center for Reproductive Law & Policy
120 Wall Street
New York, New York 10005
(212) 514-5534

Counsel for Petitioners

Dated: January 14, 2000.